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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Follow-up to the Committee's Day of General Discussion on Right to Education (article 13 of the Covenant) and to the World Education Forum(Dakar, April 2000), organized in co-operation with UNESCO

Friday, 10th May 2002, 15.00-18.00h

THE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO EDUCATION AND MODERNIZING/DEVELOPING NATIONAL LEGISLATION IN KEEPING WITH THE STATE OBLIGATION/GOVERNMENT RESPONSIBILITY UNDER THE DAKAR FRAMEWORK FOR ACTION

Document submitted by UNESCO*

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Introduction

1. Education for All is an integral part of UNESCO's constitutional mission. The Constitution of UNESCO, which expresses the belief of its founders in "full and equal opportunities for education for all", provides basis for the normative action. The *World Declaration on Education for All: Meeting Basic Learning Needs* (1990) provided a new vision for education and gave impetus to normative action in Member States. The authors of the Declaration have expressed their determination to "act jointly" to achieve Education for All (EFA) goals, asserting that "education is a fundamental right for all people, women and men, of all ages, throughout our world". In its Preamble, the Declaration recognizes "the necessity to give to present and coming generations an expanded vision of, and a renewed commitment to, basic education to address the scale and complexity of the challenge [providing basic education for all]".

2. The *World Education Forum*, organized in April 2000 in Dakar imparted further dynamism to achieving the right to basic education for all, without any discrimination or exclusion. The *Dakar Framework for Action* clearly re-affirms "the vision (...) supported by the *Universal Declaration of Human Rights* and the *Convention on the Rights of the Child*, that all children, young people and adults have the human right to benefit from an education that will meet their basic learning needs in the best and fullest sense of the term, an education that includes learning to know, to do, to live together and to be" (paragraph 2). It thus refers to some major international standard –setting instruments relating to the right to education. It reflects certain main principles such as the principle to include universal access to learning; the principle of non-discrimination, and the principle of equity. Moreover, considering education as a fundamental right as a key to sustainable development and peace within and between countries, it reiterates the critical role of education in empowering individual and transforming societies.

State Obligation/Government Responsibility for Achieving Basic Education for All as a Fundamental Human Right as reaffirmed at the World Education Forum

3. The governments, organizations, agencies, groups and associations represented at the World Education Forum, committed themselves "to the achievement of education for all (EFA) goals and targets for every citizen and for every society" (Para.1). In order to achieve the goals and objectives set at Dakar[1], they pledged themselves to a strategy, inter alia, to: "mobilize strong national and international political commitment for education for all, develop national action plans and enhance significantly investment in basic education" (para. 8 i). The Dakar Framework for Action expresses "a collective commitment to action. Governments have an obligation to ensure that EFA goals and targets are reached and sustained" (Para. 2) and recognizes the importance of "political will and stronger national leadership" (Para. 10). Clearly, the right to education as reaffirmed at the World education Forum imposes an obligation upon States to ensure that citizens have opportunities to meet their basic learning needs.

4. The importance of the State obligation is further underlined by the Expanded Commentary on the Dakar Framework for Action: "All children must have the opportunity to fulfil their right to quality education in schools or alternative programmes at whatever level of education is considered « basic ». All states must fulfil their obligation to offer free and compulsory primary education in accordance with the United Nations Convention on the Rights of the Child and other international commitments"[2].

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[1] **These relate essentially to universalising access to good quality primary education for all, providing equitable access to basic and continuing education programmes, eliminating gender disparities in education, promoting education for all policies; and conducting educational programmes in ways that promote mutual understanding and peace.**

[2] Education for All: Meeting Our Collective Commitments – Expanded commentary on the Dakar Framework for Action, prepared by the World Education Forum Drafting Committee, Paris, 23 May 2000, (para. 32).

5. The State obligation involves the responsibility of the policy makers. "Education planners have a responsibility to find the children who are not in school and to design programmes to include every child in education, guided by the principle of the *best interests of the child*"[3].

6. For achieving the six objectives agreed at the World Education Forum, the main responsibility devolves upon the governments. UNESCO's Medium-Term Strategy 2002-2007 reiterates this: "Advancing the right to education as enshrined in the Universal Declaration of Human Rights is central to UNESCO's mission. Free, compulsory and universal primary education for all is among the most clearly defined of these rights, which governments have duty and responsibility to make a reality"[4]. This was further underlined at the first meeting of the High Level Group on Education for All, convened by the Director General of UNESCO at UNESCO Headquarter on 29 and 30 October 2001. In the Communiqué issued at end of this meeting, the participants underlined "the core responsibility of governments for education, and especially to provide free and compulsory quality basic education for all"[5].

7. The legal implications of the Dakar Framework for Action were examined during the Informal Expert Consultation on Monitoring the Right to Education, organized at UNESCO Headquarter in March 2001. The Consultation underlined the importance of (i) examining the bases of the Dakar Framework for Action in both modern constitutional law and international law, and (ii) establishing the relationship between the Dakar Framework and existing normative instruments as a continuity of existing law.

8. The State obligation for providing basic education for all, undertaken at the World Education Forum must be viewed as part of the obligations under international law (pertaining to the right to education) as contained in international instruments, notably Article 26 of the Universal Declaration on Human Rights, Articles 4 and 5 of the *Convention against Discrimination in Education* (1960), Articles 28-30 of the *Convention on the Rights of the Child*, and Articles 13 and 14 (right to education) of the International Covenant on Economic, Social and Cultural Rights. Under the International Covenant, the obligation of the State is broad - the obligation to respect, protect and fulfil[6]. General Comment No. 13 on right to education (Article 13 of the Covenant) adopted by the Committee on Economic, Social and Cultural Rights in December 1999 lays emphasis on how the States are duty bound to implement the provisions enshrined in the International Covenant (article 13) and refers to the *World Declaration on Education for All: Meeting Basic Learning Needs* (1990). Just as the Dakar Framework for Action, Article 13 of the International Covenant provides for the right to receive free and compulsory primary education, which should be made available to *every one*, and enjoins upon the State parties to the Covenant obligation for its progressive realisation. This obligation has been interpreted to be of continuing nature for moving as expeditiously and effectively as possible towards the realisation of this right and is of immediate effect[7].

9. A number of declarations, resolutions, and programmes of actions[8] adopted by the United Nations General Assembly reinforce the EFA, especially the Government responsibility. Thus

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[3] Report by the United Nations Secretary General "We, the Children – Meeting the promises of the World Summit for Children, United Nations, September 2001 (P. 70).

[4] UNESCO's Medium-Term Strategy 2002-2007, UNESCO, Paris, (C/4, Para. 55).

[5] Communiqué from High-Level Group on Education for All First Meeting, UNESCO, Paris, 29-30 October 2001 (paragraph 5).

[6] General Comments No. 13 on the right to education (Article 13 of the Covenant), adopted by the Committee on Economic, Social and Cultural Rights at its twenty-first session in 1999. E/C. 12/1999/10, 2 December 1999. (para. 50).

[7] Ibid. (Paras. 43-44)..

[8] The *Copenhagen Declaration and Programme of Action* adopted by the World Summit on Social development (March 1995) calls for "strengthening education at all levels and ensuring the access to education of people living in poverty, in particular their access to primary education and other basic education opportunities". The *Programme of Action on a Culture of Peace*, adopted by the UN General Assembly on 13 September 1999 entitled « Actions fostering a culture of peace through education » contains several provisions relating to the right to

- the UN General Assembly Resolution 56/116 on '*United Nations Decade Literacy Decade: education for all*' (adopted on 19 December 2001) urges Member States, in close partnership with international organizations as well as non-governmental organizations "to promote the right to education for all and to create conditions for all for learning throughout life" and assigns key role to UNESCO.

- the Commission on Human Rights Resolution[9] 2001/29, dated 20 April 2001 on 'the Right to Education' calls upon the States to "ensure progressively and on the basis of equal opportunity that primary education is compulsory, accessible and available to all".

10. The importance of UNESCO's normative action in the context of the follow-up to the Dakar Framework for Action is recognized in the Framework Agreement between UNESCO and UNICEF on Collaboration in the Field of Education, of 9 February 1999: "UNESCO, with its mandate to take on a leading, normative role" is well placed to "promote policy discussions around basic education". UNESCO will play a "normative role regarding conceptual development and policy formulation for upstream activities [...]".[10]

11. The State obligation for the right to education was underlined by UNICEF, while addressing the first meeting of the High-Level Group on Education for All in October 2001: "we are united in the knowledge that a quality primary education is the right of all children – and the obligation of all governments, its primacy proclaimed by agreements ranging from the Universal Declaration of Human Rights to the Convention on the Rights of the Child and the Jomtien Declaration on Education for All. [...]"[11].

12. A number of standard-setting instruments adopted by UNESCO (relating to the right to education) reinforce the State obligations contained in other international instruments and develop this right in its various dimensions. In adopting them, the Governments have undertaken political commitments under the auspices of UNESCO.

13. States and governments adopting these declarations and recommendations also subscribe to moral commitments. These instruments clearly state their intention to implement them, even though, as in the case of United Nations resolutions, there are no legal penalties for non-compliance. They demonstrate an indisputable moral resolve to abide by the commitments assumed by those States and their partners when voicing their intention to adopt a given set of guidelines, as seen in the *World Declaration on Education for All* or the *Dakar Framework for Action*. The ethical basis and moral force of these declarations therefore needs to be recognized. Although not legally binding, agreed instruments have a normative character in their intent and effects and the States concerned regard them as political or moral commitments. The ethical value of such declarations is set to acquire increasing recognition[12].

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education. It provides (in section 9) that actions fostering a culture of peace through education should :

- Reinvigorate national efforts and international co-operation to promote the goals of *education for all (...)*;
- Ensure that children, from an early age, benefit from education (...);
- Ensure equality of access for women, especially girls, to education.

[9] Commission on Human Rights Resolution 2001/29, (E/CN.4/RES/2001/29), dated 20 April 2001.

[10] Recommendations of the UNESCO/UNICEF Joint Committee on Education, documents 160 EX/9 and Corr., Paris, September 2000 (paras. 3 and 4).

[11] Statement by the representative of UNICEF at the first meeting of the High-Level Group on Education for All, convened by UNESCO's Director General, UNESCO, Paris, 29-30 October 2001.

[12] "The commitments that States and governments make in adopting standard-setting instruments need to be considered in the light of the legal and moral force of declarations in modern international law. United Nations doctrine considers a declaration to be "a formal and solemn

14. Monitoring the implementation of UNESCO's instruments in Member States contributes to achieving the Dakar goals. Thus:

15. the sixth consultation on the implementation of the Convention against Discrimination in Education (1960) in Member States conducted recently[13] resulted in the resolution adopted in November 1999 by UNESCO's General Conference[14]. This resolution invites "the Director General to strengthen UNESCO's action against discrimination in education to ensure the widest possible democratisation of education and to study, in view of the Seventh Consultation and in co-operation with the United Nations, the possibility of creating a coherent mechanism of reporting on and monitoring of the right to education as it is set down in various United Nations conventions on human rights". The Convention enjoins upon States obligations in order to ensure that there is no discrimination in education and formulates some basic principles of non discrimination, equity and equality of opportunity and of national treatment in education. The States are duty-bound to ensure that these principles are upheld.

16. implementation of the *Hamburg Declaration on Adult Learning* (1997)[15] whose importance for lifelong learning needs no emphasis: Stating that "Adult education" is more than a right", the declaration stipulates that "The State remains the essential vehicle for ensuring the right to education for all, particularly for the most vulnerable groups of society, such as minorities and indigenous peoples, and for providing an overall policy framework";
17. follow-up measures to the *World Declaration on Higher Education for the Twenty-first Century*[16], which covers a range of activities. The Priority Action at National Level, provided for in the Declaration, underlines the responsibilities of the "States, including governments, parliaments and other decision-makers" to "establish, where appropriate, the legislative, political and financial framework for the reform and further development of higher education" so that it shall be "accessible to all on the basis of merit" without any discrimination;

18. implementation of the *Declaration and Integrated Framework of Action on Education for Peace, Human Rights and Democracy* (1995). Report submitted to the Executive Board at its 162nd session in October 2001 on such implementation also takes an overview of the developments in values education in Member States;

19. As the Expert Consultation on Monitoring the Right to Education, organized at UNESCO Headquarter in March 2001 suggested, the Dakar Framework for Action must be examined in its nexus with constitutional law.

Constitutional and Legal Bases of the Dakar Framework for Action

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instrument, suitable for occasions when principles of great and lasting importance are being enunciated [...]". In view of the greater solemnity and significance of a "declaration" (as opposed to a "recommendation"), it may be considered to impart, on behalf of the (United Nations) organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States". UNESCO's standard setting instruments, UNESCO, Paris, 1986 (General introduction, p. xiv).

[13] « Examination of the Reports and Responses received in the Sixth Consultation of Member States on the Implementation of the Convention and Recommendation against Discrimination in Education », (document 156 EX/21), and decision 6:3 taken by the Executive Board.

[14] 30 C/Resolution 15.

[15] The *Hamburg Declaration on Adult Learning* adopted by the Fifth International Conference on Adult Education (14-18 July 1997), carries "The Agenda for the Future" which sets out commitment to development of adult learning, containing a series of commitments on important themes such as "ensuring universal right to literacy and basic education". The Declaration also contains *Follow up Strategy.*

[16] The Declaration was adopted by the World Conference on Higher Education: Vision and Action (September 1998) and contains a *Framework for Priority Action for Change and Development in Higher Education.*

20. It is vital to strengthen the constitutional and legal bases of the right to education and to take fully into account the legal implications of the Dakar Framework for Action. UNESCO, which has assumed greater responsibilities in the field of the right to education in the wake of the World Forum on Education for All has a special role in this respect. Meeting the challenge of universalising access to education for the millions of children who are deprived of it and achieving the basic right to education for all as a fundamental human right is one of the biggest moral challenges of our times.

CONSTITUTIONAL BASES OF THE RIGHT TO EDUCATION

21. As regards constitutional law and the enforcement of the right to education, India's experience and approach has special significance in view of the recent decisions by the Supreme Court of India to the effect that the right to education is an integral part of the right to life[17]. The Supreme Court took into account the State obligation under the international treaties namely the International Covenant on economic, Social and Cultural Rights (Article 13 of the Covenant – the right to education).

22. The amendment to the Constitution of India (Article 21A) reinforces the State obligation and government's responsibility: With a view to making the right to free and compulsory education a fundamental right, a new article has been inserted in India's Constitution – Article 21A – conferring on all children in the age group of 6 to 14 years the right to free and compulsory education. The constitutional provisions as amended read: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".

23. This is a landmark development and provides a pioneering response to the Human Development Report 2000 – to "achieve the guarantee of compulsory primary education in all constitutions by 2010" and asserting everyone's *entitlement* to a free elementary education, with responsibility for the social system[18].

24. In this respect, developments elsewhere such as constitutional reforms such as in Kenya are pertinent.

MODERNIZING/DEVELOPING NATIONAL LEGISLATION

25. At the World Education Forum, the participants expressed their determination: "We will strengthen accountable international and regional mechanisms to give clear expression to these commitments and to ensure that the Dakar Framework for Action is on the agenda of every interna.ional and regional organization, every national legislature and every local decision-making forum"[19] (para. 13 Dakar).

26. The crucial question is how the States fulfil their obligations and their responsibilities by modernizing/developing national legislation, where necessary and how their political commitments, especially those undertaken under the aegis of UNESCO, are translated into government policies for action?

27. It is thus important to translate the political commitments into practice. Concern for this was expressed recently at the first meeting of the High-Level Group for Education for All, convened by the Director General of UNESCO at UNESCO Headquarter, in October 2001), especially for:

- "making basic education compulsory and truly free of charge for all children",

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[17] **Decision by a Constitution Bench of this Court in Unni Krishnan, J.P. v. State of A.P. (1993 I. SCC 645). The Supreme Court held in M.C. Mehta versus State of Tamil Nadu and others. that Article 24 in Part IV of India's Constitution was casting a duty on the State to endeavour to provide free and compulsory education to children. (1996, 6, Supreme Court cases, 756).**

[18] Human Development Report 2000, published for UNDP by Oxford University Press, 2000 (p. 13).

[19] The Dakar Framework for Action (paragraph 13). Emphasis added.

- "drawing up education legislation and priorities in line with the Human rights Conventions and the EFA goals",
- "meeting the special needs of children with disabilities, health or other learning problems through 'inclusive education'".[20]

28. In the context of follow-up to the World Education Forum, certain crucial questions arise: how governments fulfil their primary responsibility in universalising primary/basic education; how these obligations and commitments are incorporated into constitutional provisions and translated into educational laws and policies? What is the status of the right to education in a country's constitution and/or national laws? To what extent, the right to education is enforceable? And how a country's laws and educational policies are implemented? How the education policies and laws are undergoing modifications and are being reformulated in response to the State Obligations/government responsibilities undertaken at the World Education Forum? What are the trends in policy developments promoting the universal access to the realisation of the right to education? Several trends and developments as presented during the first meeting of the High Level Group on EFA (October 2001) as well as at the 31st session of the General Conference in November 2001 are noteworthy - constitutional amendment in India to provide for the right to free, compulsory education; new law – Compulsory Primary Education Act (ordinances) 2001 - in Pakistan; the Education Act of 2000 currently before the National Legislature in Liberia; the new legislation on the right to education in Lithuania reflecting the philosophy behind EFA; need for new legislation on EFA for the countries in transition to democracy underlined by Russian Federation; and the importance of legal measures for marginalized groups as suggested by Namibia etc.

29. Following the Constitutional amendment in India, legislation would be introduced in parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is enacted. Moreover, the impact the Constitutional amendment would have on the directive principles of state and on state education policy would be very significant, since its objective is:

- to provide in Article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of 6 years; and
- to amend Article 51A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

30. Modernizing/developing national legislation is important so that it conforms to the commitments to EFA goals and provides legal basis for National EFA Plans. Review of normative action in areas such as provision for free, compulsory primary education, the status and training of teachers; institutional responses to lifelong learning; gender equity, equal opportunity in education for all, inclusive education as also access to education by children in emergencies and difficult situations etc. is crucial in a spirit to ensure that they are in conformity with the goals and objectives set at the World Education Forum.

31. In this respect, a new law on education elaborated by the Republic of Lithuania is illustrative. The Republic of Lithuania elaborated in 2001 national legislation on education in the spirit of the Dakar Framework for Action. The new Law on Education reaffirms the right to education as a fundamental human right[21]. It provides that the new Education System should promote equal education opportunities, efficiency and quality of education also the Adult and Special Education in particular for socially excluded persons, persons with disabilities and vulnerable and disadvantaged children. The new Law also guarantees the quality of education services and their constant improvement through co-ordination of policy formation, management, planning, delegation of powers and responsibilities, analysis and monitoring, as recommended in the Dakar Framework for Action.

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[20] Statement by Mr. Carl Lindberg from Sweden at the first meeting of the High-Level Group', convened by the Director General of UNESCO at UNESCO Headquarter from 29-30 October 2001.

[21] The Law recognizes that education is a "fundamental human right". Chapter one, General Provisions, The new Law on Education, Republic of Lithuania, 2001.

32. In 2001, the Islamic Republic of Pakistan adopted a new Law – to provide for compulsory primary education in the Islamabad Capital Territory (Ordinance 2001)[22]. The objective of this Ordinance is to enable all children to attend a primary school until they have completed the primary education course. In that spirit, a Committee on Education has been constituted to ensure that every child, that falls under this Ordinance, really attends a school. The Law also lays down the responsibility of the parent, which includes a guardian or any other person who has the custody of the child. The Committee has the possibility to pass an order directing the parent, who has failed in his duty without a reasonable excuse, to cause a child to attend a school. The parent who fails to comply with this order may, on conviction by a Magistrate, be punishable with fine.

33. The Early Childhood Care and Development Act (5 December 2000)[23], enacted by the Philippines promulgates a Comprehensive Policy and a National System For Early Childhood Care and Development (ECCD) and institutionalises ECCD. The Act lays down the responsibilities of the National Government for developing policies and programmes, providing technical assistance and support to the ECCD service providers.

34. In keeping with the obligation and responsibility of the Government for achieving the objectives and goals of the Dakar Framework for Action, new legislation in the field of the right to education will also be necessary in many other countries, specially in countries in transition to democracy. It is only through a country's education laws and policies that the right to basic education for all can be given concrete shape in terms of educational programmes and projects. It is therefore important to examine the current policy developments and evolutions in national laws.

Issues for Consideration

35. A major issue is how to enhance recognition and importance of the legal implications of the Dakar Framework for Action, mainly with a view to strengthening constitutional and legislative bases of the right to education as a fundamental human right so as to concrete shape to the government responsibility? Issues relating to the elimination of the legal and other obstacles for realising the right to education - increasing racial discrimination, economic exclusion, growing poverty as well as the adverse impact of the privatisation of educational services in achieving education for all - and the State obligation to preserve education as *common good* need to be addressed more effectively. As UNESCO's Medium-Term Strategy (2003-2007) stipulates, "UNESCO will further seek to engage Member States and new educational providers in a **dialogue highlighting education as a public good and encourage all actors in the field of education to pay due regard in their undertakings to the need for equity, inclusion and social cohesion** in today's societies"[24]. As regards the obligation for providing universal access to education, international level action must defend most basic forms of education public services concept.

36. Increasing investment in basic education is indispensable for development. However, as the Report by the United Nations Secretary General "We, the Children – Meeting the promises of the World Summit for Children" (2001) states, "during the 1990's, reform packages in some countries led to the introduction of user fees where basic education had previously been free. This directly contradicts the commitments to free and compulsory education in the Convention on the Rights of the Child"[25]. In face of such trends, the question is how to ensure that critical and overriding importance of the right to education in the context of the national level policy measures and development strategies, while concluding arrangements with the financial institutions? Owing to provisions in various

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[22] The Islamabad Capital territory Compulsory Primary Education Ordinance, 2001.

[23] The Early childhood Care and Development Act (Republic Act No. 8980) of 5 December 2000. The Act provides that the ECCD shall be the joint responsibility of schools, parents, teachers and community associations and seeks to promote and encourage private sector initiative for the establishment of ECCD programmes.

[24] UNESCO's Medium-Term Strategy 2002-2007, UNESCO, Paris, (C/4, Para. 59).

[25] Report by the United Nations Secretary General "We, the Children – Meeting the promises of the World Summit for Children, United Nations, September 2001. This report mentions that "less than 2 per cent of international aid goes to primary or basic education, and the major recipients of aid for education are not the least developed countries" (p. 68).

international instruments, "States have an obligation to ensure that their actions as members of the international organizations, including international financial institution, take due account of the right to education"[26].

37. A matter which deserves a special attention is that the Dakar Framework for Action must be reflected in national laws and policies more effectively and necessary measures are taken so that Member States benefit from exchange of experiences in this respect. This is crucial in the context of UNESCO's normative action in this field which is assuming greater importance as the centrality of the right to education in the field of human rights is being increasingly recognized - education not only as a right in itself but also as "indispensable for the exercise of other human rights"[27].

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[26] General Comments No. 13 on right to education (Article 13 of the Covenant) , op.cit. (para.56).

[27] General Comments No. 13 on right to education (Article 13 of the Covenant). The General Comment states at the outset that "Education is both a human right in itself and an indispensable means of realizing other human rights".